STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County
Honorable Lee S. Alford, Circuit Court Judge
Appellate Case Tracking No. 2012-213281

City of Fort Mill, Appellant,

vs.

Colin Duane Fitzgerald, Respondent.

INITIAL BRIEF OF APPELLANT

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II. The circuit court erred in finding the City failed to produce a video recording in conformity with section 56-5-2953 of the South Carolina code; erred in finding the arresting officer was required to provide an affidavit; and erred in reversing Respondent's conviction and dismissing the charges.

III. The circuit court erred in failing to consider the totality of the circumstances prior to reversing Respondent's conviction and dismissing the charges against him.

STATEMENT OF THE CASE

Respondent was arrested for driving under the influence on October 9, 2011. His case proceeded to trial April 24, 2012. The City proceeded on the charge of driving with an unlawful alcohol concentration (DUAC). Prior to trial in the Municipal Court for the City of Fort Mill, Respondent's counsel made several motions to dismiss the charges related to the failure to comply with section 56-5-2953 of the South Carolina Code (Supp. 2011). The Municipal Court, Judge Peter J. Lenzi, Jr., denied the motions. The jury convicted Respondent of DUAC. The jury, however, failed to find a breath alcohol concentration (BAC) so the trial court did not sentence Respondent. The trial court granted a mistrial because the error was determined after the jury was released.

On May 1, 2012, Respondent filed his Notice of Appeal indicating the failure of the jury to find the BAC and raised issues related to the trial court's failure to dismiss the case. He did not raise any issue related to the mistrial being granted by the municipal court. The Honorable John C. Hayes, III, considered the appeal and found it not ripe because Respondent had not been sentenced. Even though the issue of the mistrial was not raised to him, Judge Hayes ordered the mistrial be set aside and remanded the case for sentencing. Respondent was subsequently sentenced by the municipal court. This sentencing was done without a hearing attended by the parties and without notice to the State.

Respondent again filed a Notice of Appeal.[1] The circuit court reversed his conviction and sentence finding the officers failed to produce a proper video recording of the incident scene. The State filed a timely Notice of Appeal from this ruling.

The State filed a motion to vacate the rulings of the circuit court and to remand for a new trial which this Court denied. Subsequently, this case was certified to the South Carolina Supreme Court. The Supreme Court denied a motion to vacate and remand. Further, the Supreme Court remanded for this Court to consider the appeal. This Brief follows.

[1] This Notice of Appeal appears to have been filed prior to the sentence being issued by the municipal court and is, therefore, a premature filing. Respondent never filed an amended Notice of Appeal after sentencing.

ARGUMENT

I. The circuit court lacked jurisdiction to hear this case because the original case in municipal court ended in a mistrial. Further, the sentence issued should be declared null and void and the case remanded for trial. As a result, Respondent's sentence and both orders of the circuit court should be vacated and the case remanded for trial.

The City maintains the orders of the circuit court and the sentence of Respondent have been issued without proper jurisdiction and believes the orders and sentence should be vacated and the case remanded to the municipal court for a new trial. The circuit court did not have jurisdiction to hear an appeal after the grant of a mistrial. As a result, all orders and court actions since that time have occurred without proper jurisdiction and should be considered null and void.

Procedural History

The appeal arises out of a conviction for Driving with an unlawful alcohol concentration (DUAC). Respondent was arrested for driving under the influence on October 9, 2011. His case proceeded to trial April 24, 2012. The City proceeded on the charge of driving with an unlawful alcohol concentration (DUAC). Prior to trial in the Municipal Court for the City of Fort Mill, Respondent's counsel made several motions to dismiss the charges related to the failure to comply with section 56-5-2953 of the South Carolina Code (Supp. 2011). The Municipal Court, Judge Peter J. Lenzi, Jr., denied the motions. (Return dated August 14, 2012; R.___)

The jury convicted Respondent of DUAC. The jury, however, failed to find a breath alcohol concentration (BAC) in accordance with its duties under section 56-5-2933(L) of the South Carolina Code. The matter was brought to the Court's attention by

Respondent's counsel. The Municipal Court did not enter a sentence for Respondent because the jury's determination is necessary to establish the range for sentencing after a conviction for DUAC. Instead, the trial court, *sua sponte*, granted a mistrial because the error was discovered after the jury was dismissed. (Verdict; R.___).

On May 1, 2012, Respondent filed his Notice of Appeal and Appellant's Brief. He appealed the conviction, even though the Municipal Court had granted a mistrial. In his Notice of Appeal and Appellant's Brief, he claimed the Municipal Court erred in refusing to dismiss the case based on the failure of the City to comply with section 56-5-2953. Respondent failed to raise any issue related to the mistrial being granted by the Municipal Court. (Notice of Appeal and Appellant's Brief; R.___).

The Honorable John C. Hayes, III, considered the appeal. Even though no issue related to the mistrial was before him, Judge Hayes ordered the mistrial be set aside as improvidently granted. Further, he remanded the case for sentencing according to the verdict of the trial jury. (Form 4 Order of Judge Hayes dated June 27, 2012; R.___). The ruling occurred even though Respondent never requested the mistrial be set aside or the case remanded for sentencing.

According to the York County Clerk of Court's stamp, Respondent filed a second Notice of Appeal from the conviction on July 23, 2012.[2] (Notice of Appeal filed July 23, 2012; R.___). As before, Respondent raised three issues related to the videotape and lack of an affidavit in violation of section 56-5-2953(A) and (B). At the time he filed this second Notice of Appeal, Respondent still had not been sentenced by the Municipal

[2] The date of service of this Notice of Appeal is questionable. The Notice of Appeal is stamped filed by the Clerk of Court for York County on July 23, 2012. The Certificate of Service which accompanies the Notice indicates it was not served on the City or the Municipal Court until July 30, 2012, even though the page listing the July 30 date is stamped by the Clerk as filed July 23.

Court. (Return of Appeal by Judge Lenzi dated July 27, 2012; R.___). According to the Municipal Court's Return, no conviction existed and the case remained on the Jury Trial Docket.

Counsel for the City attended two hearings in an attempt to have Respondent sentenced, but neither resulted in a sentence. Subsequently, and without parties present or being in open court, the Municipal Court sentenced Respondent to a $997 fine or 30 days in jail. The City learned about his sentencing only after the fact. (9/12T. 3-7; R.___). The Department of Motor Vehicles received notice of the conviction on August 6, 2012. (Uniform Traffic Ticket; R.___).

A second hearing was held in circuit court before the Honorable Lee S. Alford. The hearing was held September 7, 2012. At the hearing, the City's attorney explained to the circuit court the circumstances under which Respondent was sentenced. Further, the parties argued the issues raised by Respondent's second Notice of Appeal and Brief.

After hearing argument, the circuit court issued an Order filed September 28, 2012, reversing the conviction and dismissing the case. The court found the lack of audio on the video recording, and the arresting officer's failure to provide an affidavit pursuant to Section 56-5-2953(B) to explain the lack of audio, necessitated dismissal of the charges. (Order of the Judge Alford; R.___).

Merits

Any decisions of the circuit court have been without proper appellate jurisdiction and on interlocutory, unappealable rulings. As a result, neither Judge Hayes not Judge Alford had subject matter jurisdiction to entertain any issues related to this case and Judge Lenzi no longer had jurisdiction to impose sentence on Respondent. The rulings of

Judge Hayes and Judge Alford should be vacated, along with the sentence imposed by Judge Lenzi. All these actions occurred subsequent to a mistrial being granted, which ended the case and set the parties back at the position they held prior to the trial.

Subject matter jurisdiction, defined by the Supreme Court as the "the power of a court to hear and determine cases of the general class to which the proceedings in question belong," may be raised at any time and may not be waived by the parties. State v. Gentry, 363 S.C. 93, 100, 610 S.E.2d 494, 498 (2005). The circuit court's appellate jurisdiction should be considered similar to subject matter jurisdiction. Accordingly, it should not be allowed to be waived by consent or action of the parties and should be allowed to be raised at any time. See e.g., Floyd v. Page, 124 S.C. 400, 117 S.E. 409 (1923) (finding even though both parties appealed after a mistrial thereby clearly indicating their assent to appellate jurisdiction, the appeal was prematurely brought, and jurisdiction thereof may not be entertained by the appellate courts).

First, a court's grant of a mistrial is not appealable. Section 14-25-95 of the South Carolina Code provides: "Any party shall have the right to appeal from the **sentence** or **judgment** of the municipal court to the Court of Common Pleas of the county in which the trial is held." In the instant case, because the municipal court granted a mistrial, there was no sentence or judgment in the case from which Respondent could appeal to the Court of Common Pleas. The statute does not allow appeal from a conviction without a final sentence; it only allows appeal to the circuit court from a final sentence or judgment.

Respondent did not appeal from a judgment or sentence. The municipal court did not pronounce sentence, but, instead, ordered a mistrial because he already dismissed the jury and there was no means to make the determination required in order for Respondent

to be sentenced. As a result, Respondent appealed after the municipal court ordered a mistrial which meant there was no final sentence and the parties were placed back in their original positions as if trial never occurred. As a result, the circuit court did not have jurisdiction to entertain the appeal. See Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 344, 713 S.E.2d 278, 284 (2011) (finding appellate jurisdiction conferred only when notice of appeal is filed with the municipal court "within ten days after sentence is passed or judgment rendered"); Keels v. Powell, 213 S.C. 570, 573, 50 S.E.2d 704, 705 (1948) (finding premature any appeal brought after a mistrial has been declared and finding Court did not have jurisdiction to hear appeal).

Further, Respondent's Notice of Appeal and Appellant's Brief did not list as an issue on appeal anything related to the grant of the mistrial. Instead, Respondent attempted to appeal the denial of his motions to dismiss. Judge Hayes' Order only related to the grant of the mistrial, and, as a result, was on a basis not properly appealed to him. Section 14-25-95 requires the party appealing to set forth the ground for appeal in the Notice of Appeal. As a result, Judge Hayes, without proper jurisdiction, ruled on issues not properly raised in the Notice on Appeal dated May 1.

Additionally, this case is similar to the case of Floyd v. Page, 124 S.C. 400, 117 S.E. 409 (1923). In Floyd, the parties were involved in a civil suit which ended in a mistrial. Both parties filed an appeal from the mistrial alleging the trial court erred in denying their respective motions for directed verdict. This Court stated:

> The effect of the mistrial was to leave the parties litigant in *statu quo ante*, with the cause still pending for trial in the circuit court. The rulings of the trial judge in the court below having eventuated in no binding adjudication of the rights of the parties, the appeal is prematurely brought, and jurisdiction thereof may not be entertained.

Id. As in Floyd, the appeal to the circuit court was premature and Judge Hayes' Order should be declared null and void as he ruled without proper jurisdiction. Because his order required the sentencing to take place, any sentence given to Respondent is also null and void. The appeal to Judge Alford should then have not taken place and, as a result, the entire case should be remanded to the municipal court for a trial in which all issues raised by Respondent in the circuit court can be addressed by the municipal court.

In addition, if a party is not entitled to appeal an order of the lower court, any ruling on appeal should be deemed null and void. In State v. Smith, 383 S.C. 159, 679 S.E.2d 176 (2009), the South Carolina Supreme Court vacated an opinion of the Court of Appeals because the Court found the State did not have a right to appeal the underlying order of the lower court. Id. at 169, 679 S.E.2d at 182. Under this precedent, this Court should vacate the ruling of Judge Hayes, and all subsequent rulings, because Respondent did not have the right to appeal from the grant of a mistrial. Any ruling by the circuit court would be null and void just as the ruling in Smith.

Also, the appeal brought before Judge Alford was premature and should have been dismissed. The Notice of Appeal was filed with the court on July 23, 2012. On July 27, 2012, the Municipal Court indicated his belief there was no conviction as a result of the mistrial being granted. Respondent had not been sentenced by July 23, 2012, and so the requirement of section 14-25-95 that an appeal lie only from a sentence or a final judgment had not been met. Finally, based on the information from the DMV, it appears the sentence was not sent to them until August 6. As a result, the appeal was not from a final sentence or judgment and should not have been heard. Respondent never filed an Amended Notice of Appeal to indicate the conviction was final after sentencing.

Accordingly, Judge Alford was without proper jurisdiction under section 14-25-95 to hear the appeal and his ruling should be vacated and the case remanded for a new trial pursuant to the mistrial entered by the Municipal Court.

As a final matter, the sentence itself is invalid, null and void and should be vacated. The sentence was not issued in open court with either party present. Further, it was issued in violation of Respondent's right to be present at all important stages of a case. This State has long held that sentences of a convicted defendant must be passed in open court and with the defendant present. See State v. Chancellor, 32 S. C. Law (1 Strob.) 347 (Ct. App. 1847). Additionally, sentences not rendered in open court have been declared null and void. See State v. Nathans, 49 S.C. 199, 27 S.E. 52, 62 (1897). Finally, this Court recently reiterated the need for having an oral pronouncement of a sentence in open court with the defendant present. In Boan v. State, 388 S.C. 272, 695 S.E.2d 850 (2010), the Court found an oral pronouncement made with the defendant present superseded a later written sentence because the safeguard of having the sentence made in open court without the defendant present was not followed in making the written sentence. As a result, in this case, the sentence issued by the Municipal Court with no parties present, and without any hearing being conducted in open court, should be vacated.

Accordingly, based on the foregoing, the City believes this Court should vacate the orders of the Judge Hayes and Judge Alford and the sentence imposed by the municipal court, all of which have occurred without jurisdiction of those courts to take the actions taken. All actions taken by the lower courts were after the grant of a mistrial, which had the effect of vitiating the prior trial and proceedings and setting the parties

back in the position of awaiting trial. Further, both orders of the circuit court were issued without proper appellate jurisdiction as neither involved an appeal from a final conviction and sentence as required under 14-25-95. Finally, the sentence imposed was null and void because it was not done in open court with the parties present. As a result, all orders subsequent to the grant of a mistrial by the municipal court should be vacated and this case remanded for a new trial.

II. **The circuit court erred in finding the City failed to produce a video recording in conformity with section 56-5-2953 of the South Carolina code; erred in finding the arresting officer was required to provide an affidavit; and erred in reversing Respondent's conviction and dismissing the charges.**

The trial court erred in finding the City failed to produce a video in conformity with section 56-5-2953 of the South Carolina Code. The trial court erred in requiring an affidavit from either the arresting officer or the officer who video recorded the incident scene. Finally, the trial court erred in dismissing the charges against Respondent.

Factual Background

Sergeant Boone with the York County Sheriff's Department witnessed a vehicle swerving and crossing the yellow lines. The swerving of the SUV is recorded on Sgt. Boone's vehicle dash camera. He then turned on his blue lights and stopped the vehicle. Sgt. Boone already had a defendant from an unrelated case in the back of his vehicle, so he requested assistance from Fort Mill Police Department on the stop. Officer Baird arrived and took over the investigation of the stop after talking briefly with Respondent and Sgt. Boone. (Video of incident scene; T. 12-15; R.___).

Sgt. Boone remained and his vehicle camera continued to record the DUI investigation performed by Officer Baird. During the investigation, Sgt. Boone returned to his vehicle while wearing his microphone, thereby eliminating any audio of the investigation from being recorded. The video shows Officer Baird conducting several field sobriety tests, including the HGN, the walk and turn test, and the one-leg standing test. Further, the video shows Respondent being placed in handcuffs. Officer Baird then pulls something out of his shirt and shines his light down on the item while he appears to be reading the card, which he indicates is his Miranda Rights card. (Video; T.14; R.___).

Officer Baird testified before the municipal court and explained what he was doing on the video and put his Miranda card into evidence. The uncontradicted testimony at the circuit court hearing was Officer Baird testified: "I pulled it out. This is me." The solicitor explained: "And he [Officer Baird] pointed out in the video, this is me reading the Miranda card at this point." (T.14; R.___). Appellant never contested the fact he was read his Miranda rights, nor did he challenge the sufficiency of the rights he was provided.

Law/Analysis

In a criminal appeal from the municipal court, the circuit court does not review the matter de novo; rather, the court reviews the case for preserved errors raised by appropriate exception. S.C. Code Ann. § 14–25–105 (Supp. 2012); Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 341, 713 S.E.2d 278, 282 (2011). In criminal appeals from the municipal court, the circuit court is bound by the municipal court's findings of fact if there is any evidence in the record which reasonably supports them. See Rogers v. State, 358 S.C. 266, 269 n. 1, 594 S.E.2d 278, 279 n. 1 (Ct. App. 2004). The appellate court's review in criminal cases is limited to correcting the order of the circuit court for errors of law. City of Rock Hill v. Suchenski, 374 S.C. 12, 15, 646 S.E.2d 879, 880 (2007).

The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature. State v. Pittman, 373 S.C. 527, 561, 647 S.E.2d 144, 161 (2007).

> All rules of statutory construction are subservient to the maxim that legislative intent must prevail if it can be reasonably discovered in the language used. A statute's language must be construed in light of the intended purpose of the statute. Whenever possible, legislative intent should be found in the plain language of the statute itself.

Id. (internal citations omitted).

"The legislature's intent should be ascertained primarily from the plain language of the statute. Words must be given their plain and ordinary meaning without resorting to subtle or forced construction which limits or expands the statute's operation." State v. Dupree, 354 S.C. 676, 693, 583 S.E.2d 437, 446 (Ct. App. 2003) (internal citation omitted). Further, it is a "well-settled rule of statutory construction, that a court is bound, if possible, to give some place and effect to every word found in a statute." Burns v. Gower, 34 S.C. 160, 13 S.E. 331, 332 (1891); see also, Breeden v. TCW, Inc./Tennesse Exp., 355 S.C. 112, 120, 584 S.E.2d 379, 383 (2003) (finding every "word, clause, and sentence must be given some meaning, force, and effect, if it can be done by any reasonable construction").

Section 56-5-2953(A) of the South Carolina Code requires:

> A) A person who violates Section 56-5-2930, 56-5-2933, or 56-5-2945 must have his conduct at the incident site and the breath test site video recorded.
>
> (1)(a) The video recording at the incident site must:
>
> (i) not begin later than the activation of the officer's blue lights;
> (ii) include any field sobriety tests administered; and
> (iii) include the arrest of a person for a violation of Section 56-5-2930 or Section 56-5-2933, or a probable cause determination in that the person violated Section 56-5-2945, and show the person being advised of his Miranda rights.

S.C. Code Ann. § 56-5-2953(A) (Supp. 2011) (emphasis added). Section 56-5-2953(B) of the South Carolina Code requires the officer to produce the videotape or submit an affidavit explaining the failure to produce the videotape. See S.C. Code Ann. § 56-5-

2953(B) (Supp. 2011) ("Failure by the arresting officer to produce the video recording required by this section is not alone a ground for dismissal of any charge made pursuant to Section 56-5-2930, 56-5-2933, or 56-5-2945 if the arresting officer submits a sworn affidavit . . . .").

The municipal court found the video recordings complied with section 56-5-2953(A). The court concluded the video showed Respondent's conduct as required and also showed the reading of his Miranda rights. (Return of Judge Lenzi dated August 14; R.___). These findings are supported by the facts of this case.

In the instant case, the video recording complied with the requirements of subsection (A) and no portion of the video recording was missing. The section clearly requires an individual's "conduct" be captured by the video recording and then specifies certain events at the incident site during which the defendant's "conduct" must be recorded. "Conduct is generally defined as one's behavior, action, or demeanor." Murphy v. State, 392 S.C. 626, 631, 709 S.E.2d 685, 688 (Ct. App. 2011). The video recording in this case clearly began when it was required to begin[3] and lasted until the defendant was placed under arrest. The recording included Respondent's conduct throughout the process. The audio throughout is not necessary to capture Respondent's conduct as required by the statute.

This case does not involve the failure to produce the incident site video recording. Respondent received a copy of the video recording and was able to review the contents of the recording. The videotape clearly includes the administering of the field sobriety tests

[3] The recording actually begins prior to activation of the blue lights so you see all of Respondent's driving and the traffic violations justifying the stop prior to activation of Sgt. Boone's blue lights. (Video).

and demonstrates Respondent's conduct during the tests, and it shows the reading of Respondent's Miranda warnings, and concludes with his arrest. (Incident Site Video).

Any defects in the videotape go to its weight rather than admissibility. See State v. Dicapua, 373 S.C. 452, 636 S.E.2d 150, 153 (Ct. App. 2007) (Stilwell, J., concurring opinion) (lack of audio on surveillance videotape of drug sting went to the weight of the evidence, not its admissibility); see also, State v. Salisbury, 330 S.C. 250, 498 S.E.2d 655, 665 (Ct. App. 1998) (conflict in testimony regarding condition of breathalyzer machine went to weight of the test results rather than admissibility of the evidence), *aff'd as modified*, 343 S.C. 520, 541 S.E.2d 247 (2001). Defects in evidence or procedure generally do not affect admissibility. See, e.g., State v. Odom, 382 S.C. 144, 152, 676 S.E.2d 124, 128 (2009) (citing State v. Huntley, 349 S.C. 1, 562 S.E.2d 472 (2002)).

In Huntley, the breathalyzer operator is mandated by statute to utilize a particular alcohol concentration solution to ensure the machine is operating properly and returning accurate results. The operator utilized a solution with an incorrect alcohol concentration. Huntley, 349 S.C. at 5, 562 S.E.2d at 474. The defendant never challenged whether the machine was operating correctly, and instead argued the test should be suppressed merely because of the statutory violation in using the incorrect concentration. The Supreme Court found the suppression was improper given no finding of prejudice to the defendant. Id. at 6, 562 S.E.2d at 474. Citing State v. Chandler, 267 S.C. 138, 143, 226 S.E.2d 553, 555 (1976), the Court explained: "[E]xclusion of evidence should be limited to violations of constitutional rights and not to statutory violations, at least where the [defendant] cannot demonstrate prejudice at trial resulting from the failure to follow statutory procedures." Id. The Court continued: "Evidence the simulator test was not run in

conformity with Act 434 goes to the weight, not the admissibility, of Huntley's breathalyzer results." Id.

It is significant to note Respondent has never challenged the validity of the field sobriety tests or the Miranda warning he was given. He has not demonstrated, or argued, any prejudice associated with the lack of audio in the video. The State presented the officer who conducted the tests and read Respondent his Miranda warnings to explain what occurred on the video. (T.14; R.___). Respondent could make any arguments he desired regarding the content of the video. He never articulated his arguments at trial, and only maintained the video was incomplete. The jury, even after viewing a video lacking in audio, convicted Respondent of DUAC.

The State has complied with section 56-5-2953 by producing a video recording with all required events documented. Thus, since the videotape was produced, an affidavit from the arresting officer meeting the requirements of section 56-5-2953(B) was not required, and the videotape and all evidence related to the breath test should have been admitted into evidence.

The circuit court's reliance on City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E.2d 897 (2007), is misplaced. In Suchenski, the arresting officer's vehicle recorder ran out of tape before the defendant was arrested, and as a result, there was no recording of the last field sobriety test or the arrest, both events required to be recorded under the statute. Thus, under the statute, the officer could not produce a videotape of all of the required events. The officer testified a tape had never ended during an arrest before, and he did not know the tape was about to run out, but assumed the videotape was running as usual. The magistrate denied the defendant's motion to dismiss, finding exigent

circumstances excused full compliance with the statute. The circuit court reversed on appeal. The South Carolina Supreme Court affirmed, finding the City's claim of exigent circumstances was not preserved for review, and in the absence of an exception, section 56-5-2953(B) allowed dismissal of the charge. Id.

In this case, unlike Suchenski, the State produced a video recording of the entire incident site and all events required to be documented under the statute. See Section 56-5-2953(A)(2). While the audio is missing, the video recording clearly documented Respondent's conduct as required by the statute. Any defects of the video recording go to its weight to be assigned by the jury and not its admissibility under the statute. Respondent has failed to articulate any prejudice resulting from the lack of audio, especially in light of his conduct being clearly recorded, and the court should have found the video recording admissible and allowed Respondent's conviction to stand. See Section 56-5-2953(A).

III. The circuit court erred in failing to consider the totality of the circumstances prior to reversing Respondent's conviction and dismissing the charges against him.

The circuit court erred in dismissing the case in light of the totality of the circumstances in this case. The statute allows the court to consider the totality of the circumstances in determining whether to allow the case to continue. The circuit court erred in finding dismissal appropriate.

Section 56-5-2953(B) contains the following provision: "Nothing in this section prohibits the court from considering any other valid reason for the failure to produce the video recording based upon the totality of the circumstances." This provision allows the court to consider the totality of the circumstances to determine whether to excuse the failure to produce a video recording in accordance with subsection (A). If this Court finds the video in this case fails to satisfy the requirements of subsection (A), this Court should find the circuit court erred in failing to consider the totality of the circumstances as argued by the solicitor and should reinstate Respondent's conviction based on the municipal court's proper admission of the video recording.

In the instant case, Sgt. Boone initially witnessed Respondent driving ahead of him and saw Respondent cross the center line several times. Sgt. Boone's dash camera was already recording and recorded Respondent's driving as well as the activation of blue lights. Sgt. Boone then initiated a traffic stop and, because he already had an individual under arrest and in his vehicle, he radioed for assistance from Fort Mill Police Department. Sgt. Boone stopped Respondent and approached him prior to the arrival of Officer Baird from Fort Mill Police Department.

Once Officer Baird arrived, Sgt. Boone remained on scene because he had already begun the video recording of Respondent's driving and traffic stop. Sgt. Boone, however, remained in his vehicle so no sound was captured on the video because his microphone was on his person. Officer Baird then conducted the field sobriety tests and read Respondent his Miranda rights prior to arresting him for DUI.

The factual situation in this case presented a Catch 22 situation for Sgt. Boone. He could initiate the stop because Respondent's driving clearly presented a danger to the public, but he could not arrest Respondent himself because he already had someone in his vehicle under arrest. His other alternative was to let Respondent go and not initiate the traffic stop, which certainly is not the policy desired in this state. Clearly, the preferred policy would be for Sgt. Boone to initiate the traffic stop to take a potentially dangerous individual off the road.

Once he initiated the traffic stop and Officer Baird arrived, Sgt. Boone was again presented a Catch 22 situation. He could remain on the side of the road directly beside Officer Baird in hopes of having his microphone pick up the sound of the various field sobriety tests and the reading of Miranda, or he could return to his car. If he remained outside, he could be in the way trying to be close enough to pick up the sound and would be leaving an arrested individual in his vehicle unattended. If he went back to his vehicle, the arrested individual would no longer be unattended but the video recording would not have sound. Sgt. Boone returned so that the arrested person in his vehicle would not be unattended and this is the policy decision this Court should support.

Based on the totality of the circumstances, including the fact the video begins prior to the activation of the blue lights and ends after Respondent's arrest, includes the

conduct of Respondent, and shows all the field sobriety tests and the reading of Miranda as required by the statute, the circuit court erred in vacating Respondent's conviction and sentence and in dismissing the case.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the decision of the circuit court finding the video recording did not comply with section 56-5-2953 of the South Carolina Code and the charges against Respondent had to be dismissed should be reversed and Respondent's conviction and sentence reinstated.

Respectfully submitted,

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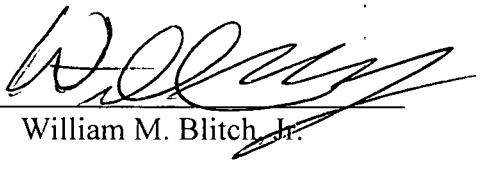
BY: 
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November 22, 2013

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City of Fort Mill, Appellant,

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Colin Duane Fitzgerald, Respondent.

DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

Appellant proposes the following to be included in the Record on Appeal:

(1) Return dated August 14;

(2) Verdict Form;

(3) Notice of Appeal and Appellant's Brief of May 1;

(4) Order of Judge Hayes dated June 27;

(5) Notice of Appeal dated July 23;

(6) Return dated July 27;

(7) Transcript of September 12 hearing;

(8) Uniform Traffic Ticket;

(9) Order of Judge Alford; and

(10) Video of Incident Scene.

To facilitate the preparation of the Final Brief, Appellant will retain the page numbers of the trial transcript in the Record on Appeal, in addition to the new page numbers.

The undersigned hereby certifies this Designation contains no matter which is irrelevant to this appeal.

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BY: _____
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Colin Duane Fitzgerald, Respondent.

PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Initial Brief of Appellant and Designation of Matter on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

J. Tyler Burns, Esquire
1012 Market Street Suite 205
Fort Mill, South Carolina 29708

I further certify that all parties required by Rule to be served have been served. This 22nd day of November, 2013.

Sally Ellison

SALLY ELLISON

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ALAN WILSON
ATTORNEY GENERAL

November 22, 2013

J. Tyler Burns, Esquire
1012 Market Street Suite 205
Fort Mill, South Carolina 29708

RE: City of Fort Mill v. Colin Fitzgerald
Appellate Case Tracking No. 2012-213281

Dear Mr. Burns:

I am enclosing two (2) copies of the Initial Brief of Appellant and Designation of Matter in the above-referenced case.

Sincerely,

William M. Blitch, Jr.
Assistant Attorney General
S.C. Bar No. 15608

Enclosures

cc: Honorable Jenny A. Kitchings (original and one enclosed)
Victim Services

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